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Twenty-fourth session

SUMMARY RECORD OF THE 447th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 14 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 16 bis (continued)

1. The CHAIRMAN said that the Drafting Group had made minor changes in the wording of the definition of the term "interest", to be included in the text as article 16 bis.

2. Mr. ABASCAL ZAMORA (Mexico) said that, as amended by the Drafting Group, the definition of "interest" read: "Unless otherwise agreed, 'interest' means the time value of the amount of the payment order in the funds or money involved. Interest shall be calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved."

3. That version took account, in particular, of the comment by the observer for Austria that the term "transaction amount" was not sufficiently precise. The second amendment involved the deletion of the word "local" in the second sentence and was intended to deal with a comment by the observer for the Banking Federation of the European Community that the word "local" was inappropriate in the context of a law of international scope.

4. Mr. VASSEUR (Banking Federation of the European Community) said that he would have preferred that the word "local" were replaced by "international" rather than merely deleted.

5. Mr. GREGORY (United Kingdom) said that the phrase "of the payment order" in the first sentence should be deleted. The first sentence would then read: "Unless otherwise agreed, 'interest' means the time value of the amount in the funds or money involved." That would avoid the problems entailed by the vagueness of the term "transaction amount", while at the same time avoiding the possibility of a discrepancy between the amount of the payment order and the amount actually transferred.

6. Mr. SCHNEIDER (Germany) said that the definition of the term "interest" was insufficiently precise since, in the first place, it did not specify what was meant by the "local banking community" and, secondly, it gave no indication of how interest was to be calculated or what kind of arrangement was involved. At the very least, it should be specified whether the bank concerned was that of the originator or of the beneficiary; the former would be his delegation's preferred choice but, in the context of the current text, the beneficiary's bank might be more appropriate.

7. Mr. HERZBERG (Observer for Israel) said that the first sentence of the definition was unnecessary. Furthermore, in the second sentence, one of the two terms "funds" or "money" could be deleted without detracting from the meaning of the sentence as a whole.

8. Mr. LOJENDIO OSBORNE (Spain) said that, while he could accept the proposed paragraph in principle, he wondered where in article 16 it would be inserted. In addition, it should be made clear whether it was intended that interest should be calculated in respect of the creditor or the debtor.

9. Mr. HERZBERG (Observer for Israel) said that the term "time value" took insufficient account of other components - such as risk and inflation - which were normally included in the calculation of interest. Rather than attempting a theoretical definition, it would be better to propose a practical method of calculating the interest.

10. The CHAIRMAN said that the inflation component was irrelevant to the calculation in view of the short periods of time involved in the cases covered by the Law. Interest would certainly differ according to the periods of time involved, but it had been generally felt that the phrase "time value" dealt with the problem adequately. As for the question as to where the paragraph should be inserted, the current proposal was that it should be included as article 16 bis, but it might just as well be transferred to article 13, which also referred to the concept of interest.

11. Mr. DUCHEK (Observer for Austria) said that the current text of the paragraph deviated considerably from the International Chamber of Commerce (ICC) Guidelines on which the original Mexican revision had been based. The ICC text, which specified that the banking community in question was the local one, was much clearer than the text before the Commission.

12. Mr. HUANG Yangxin (China) said he endorsed the views expressed by the representatives of Spain and Germany and the observer for Israel that the paragraph should offer a method of calculating interest, rather than an abstract definition. Interest should be calculated on the basis of the interbank loan rate.

13. The CHAIRMAN said that it had already been agreed that it was unacceptable to stipulate the use of a single standard, such as the interbank loan rate, for calculating interest. That was the original reason for the proposal to use a broader phrase such as "at the rate or on the basis customarily accepted".

14. The following wording might provide a satisfactory compromise: "Unless otherwise agreed, 'interest' means the time value of the amount in the funds or money involved, which is calculated at the rate and on the basis customarily accepted by the banking community." That sentence could be included in the text as a definition, the word "shall" being deleted to eliminate the impression that it was intended as a rule. The retention of the phrase "Unless otherwise agreed," would ultimately depend on the decision regarding article 3.

15. Mr. LE GUEN (France) said that the phrase "Unless otherwise agreed," might also cause problems in connection with article 16(7), which stated that the provisions of that article might be varied by agreement to the extent that the liability of one bank to another bank was increased or reduced.

16. The CHAIRMAN said that, while he recognized that the phrase in question did indeed leave a way open for parties to take action contrary to article 16(7), further discussion should be postponed until the matter of exclusivity was discussed, particularly with respect to article 16.

17. Mr. ABASCAL ZAMORA (Mexico) said that, if he understood the paragraph correctly, it meant that the parties could, by previous agreement, stipulate the rate of interest to be applied.

18. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to include the paragraph, as most recently amended, in article 2 of the text, i.e. as a definition.

19. It was so decided.

Article 4

20. The CHAIRMAN said he hoped that the problems raised by the representatives of Morocco and the Islamic Republic of Iran in connection with the term "purported sender" could be dealt with by the Drafting Group. The Commission had already discussed those aspects of article 4 which related to forgery and to the authority of one person to bind another, but had concluded that it was not necessary for the Model Law to provide a rule on either question. It had decided, however, that in article 4(2)(a) the words "under the circumstances" should be added after "a commercially reasonable method of security".

21. Structural changes had been suggested by the observer for Finland and the representative of Japan. The Finnish suggestion was that the obligations set out at the beginning of paragraph 5 should be linked to the previous paragraph by the introductory phrase "Subject to the previous paragraph,". The Japanese proposal was that the first sentence of paragraph 5 be transferred to paragraph 1 in the interests of clarity and as a means of introducing the two concepts of "source" and "error" at the very beginning of the article, which would then go on to deal with the concept of "source" in the next three paragraphs and with "error" in the fifth paragraph. The word "However," would have to be deleted from the first - formerly the second - sentence of paragraph 5.

22. Mr. HERZBERG (Observer for Israel), having endorsed the Japanese proposal that the first sentence of article 4(5) should be moved to paragraph 1, suggested that, if so, paragraphs 4 and 5 of article 4 might well be combined.

23. The CHAIRMAN said that paragraphs 2, 3 and 4 of article 4 dealt with the source of a payment order while paragraph 5 covered the question of error. It might therefore be impractical to combine paragraphs 4 and 5.

24. Mr. LIM (Singapore) said that, since the first sentence of article 4(5) stated how a sender was bound under the terms of paragraphs 1 and 2, transferring that sentence to paragraph 1 would place the matter outside the scope of paragraph 2. He was unable, therefore, to support the Japanese proposal.

25. Mr. BHALA (United States of America), having endorsed the remarks of the representative of Singapore, said he agreed with the Chairman's interpretation that an altered payment order was an unauthorized one. The text of the article was satisfactory in that respect.

26. Mr. IWAHARA (Japan) withdrew his delegation's proposal, on the understanding that, as the representative of the United States had said, an altered payment order was considered to be an unauthorized one.

27. The CHAIRMAN invited the Commission to consider article 4(1).

28. Article 4(1) was adopted.

29. The CHAIRMAN invited the Commission to consider article 4(2). He recalled that a number of drafting suggestions had been made by the observers for Finland and Sweden and the representative of Canada. The observer for Finland had suggested that the words "under the circumstances" be added after the word "security in article 4(2)(a) and that the words "complied with" in article 4(2)(b) be replaced by "performed properly". The Swedish suggestion was that the word "safe" be inserted before "commercially reasonable" in article 4(2)(a), while the Canadian proposal was that the word "provided" in article 4(2)(a) be deleted.

30. If he heard no objection, he would take it that the Commission wished to add the words "under the circumstances" to article 4(2)(a).

31. It was so decided.

32. Mr. GREGORY (United Kingdom), speaking on the suggestion that the words "complied with" be replaced by "performed properly", said he recognized that it was necessary to make it clear that an order must in fact have been authenticated if the purported sender were to be considered as being bound. He proposed that a new subparagraph be added to that effect.

33. Mr. BHALA (United States of America) asked the observer for Finland if she would clarify the purpose of her suggestion, after which there should be further discussion of the related United Kingdom proposal.

34. Ms. KOSKELO (Observer for Finland) explained that the purpose of her proposal was to make it clear that the receiving bank had to bear the risk in the event of falsely positive authentication resulting from a technical malfunction in the receiving bank.

35. The CHAIRMAN said that it might be thought that, if there had been a technical malfunction in the receiving bank, then that bank could not be regarded as having complied with the authentication requirement.

36. Mr. BOSSA (Observer for Uganda) said he wondered whether the concerns of the observer for Finland might not be satisfied by the addition of the word "duly" before the words "complied with".

37. Mr. BHALA (United States of America) said he thought it desirable to retain the wording "complied with". The valid point made by the observer for Finland should be reflected in the comments and be borne in mind during the discussion on standards of commercial reasonableness.

38. Ms. KOSKELO (Observer for Finland) explained that she had been referring not so much to the commercial reasonableness of a system as to the fact that there could be a technical malfunction in a basically good system, and that might cause problems.

39. Mr. ERIKSSON (Observer for Sweden) said that the term "commercially reasonable" was rather imprecise, as pointed out in the Secretariat's comments (A/CN.9/346, p. 27, para. 9), and greater clarity would be achieved by adding the words "safe and" before it.

40. He had been somewhat surprised to hear a speaker state that the term "commercially reasonable" might be used in connection with the problem of forged signatures since the term did not, he thought, provide enough guidance. Furthermore, the Working Group had already agreed that paragraphs 2 to 4 of article 4 would not apply in cases of forged signatures.

41. Mr. KOMAROV (Union of Soviet Socialist Republics) pointed out that, if the word "safe" were added, it might imply that some commercially reasonable methods were not safe, and that itself did not seem very reasonable.

42. Ms. KRAG JORGENSEN (Denmark) said that it was important that the method should be safe as well as commercially reasonable; she therefore supported the Swedish suggestion.

43. Mr. LOPEZ ROCA (Observer for Colombia) said that, since article 4(2)(a) mentioned a "commercially reasonable method of security", it was hardly necessary to add the word "safe".

44. Ms. KOSKELO (Observer for Finland) said she supported the suggestion in principle but suggested that some such word as "reliable" would be more appropriate than "safe", or perhaps the two could be combined. Because of the vagueness of the term "commercially reasonable", her delegation had prepared an indicative list of the factors that should be taken into account in assessing what was commercially reasonable.

45. Mr. ABASCAL ZAMORA (Mexico) said he fully agreed with the representative of the Union of Soviet Socialist Republics and the observer for Colombia. To add the word "safe" would create confusion. He did not understand what could be meant by a commercially reasonable method that was not safe. Incidentally, it was not true that the Working Group had agreed that paragraphs 2 to 4 of article 4 would not apply in the case of a handwritten signature.

46. Mr. BISCHOFF (Observer for Switzerland) said he agreed with the representative of Mexico. A safe system meant a faultless system, and that did not exist. An expert would be able to determine whether a method was commercially reasonable but could not determine whether it was safe.

47. Mr. LENNARD (Observer for Australia) said he supported the Swiss view. The term "commercially reasonable" would include reliability in all circumstances. The comments on the Model Law should indicate that reliability was a factor relevant to commercial reasonableness.

48. Mr. ERIKSSON (Observer for Sweden) said that he would not pursue his suggestion, on the understanding that the comments would comprise a statement that the concept of a commercially reasonable method should include the notion of security of authentication.

49. The CHAIRMAN said that all the members of the Commission accepted that "commercially reasonable" incorporated the idea of "safety", a fact that would be reflected in the summary records and in the commentary.

50. Mr. BURMAN (United States of America) said that he agreed with the views expressed by the representative of the Union of Soviet Socialist Republics. He would return to the commentary on article 4(2) after the discussion of article 4(3) in order to ensure that the understanding of the Commission was correctly recorded.

51. Mr. AL-NASSER (Observer for Saudi Arabia) said that the banks in his country regarded the expression "commercially reasonable" as too vague.

52. Mr. DE BOER (Netherlands) said he thought that it had been agreed that the question whether signature comparison could be considered a commercially reasonable method of authentication was to be discussed in the context of article 4.

53. The CHAIRMAN said there had been an understanding at an earlier stage that signature comparison could be an authentication procedure, if so agreed by the parties. Whether or not it was a commercially reasonable method would depend on the circumstances, such as the amount of the sum involved.

54. Mr. ERIKSSON (Observer for Sweden) said that, in his country, signature comparison would never be a "commercially reasonable method". The differing views on what constituted a "commercially reasonable method" of authentication clearly revealed the vagueness of the term.

55. To solve the problem of forged signatures, an added sentence stating that paragraphs 2 to 4 of article 4 did not apply to forged signatures was needed.

56. The CHAIRMAN said he thought that the words "under the circumstances" would accommodate different practices and concepts of what was "commercially reasonable". Moreover, signature comparison might be expressly excluded from the definition of authentication in article 2(j), as the observer for Finland had suggested.

57. Mr. ABASCAL ZAMORA (Mexico) said he could not agree that paragraphs 2 to 4 of article 4 did not apply to signature comparison. It was unacceptable that the parties should be prohibited from agreeing that comparison of signatures was a means of authentication, covered by the requirement that it should be commercially reasonable. The alternative would be to place an undue

(Mr. Abascal Zamora, Mexico)

restriction on the will of the parties. There was also the question of defining a "signature". Modern techniques, such as the comparison of electronic signatures, were much more secure. He therefore thought the text should be retained as it stood.

58. Ms. KOSKELO (Observer for Finland) said that, although she had raised the issue in relation to article 2(j), it would be more appropriate to resolve the problem in the context of article 4.

59. The question was not whether the procedure was commercially reasonable or not but, rather, who was to bear the risk. It would not be appropriate to apply the same rules for loss allocation in the case of forged signatures, because signatures were not secret but public and thus easily subjected to misuse. She was therefore in favour of keeping to the traditional rule whereby the receiver who relied on a signature was the one to bear the risk.

60. She therefore supported the Swedish suggestion that paragraphs 2, 3 and 4 of article 4 should not apply in the case of forged, handwritten signatures. The issue related only to signatures that were handwritten. Electronic signatures, and others which might be developed, were much safer and would be covered by paragraphs 2 to 4 of article 4. In any case, if signature comparison was excluded from article 4(2) to (4), the parties could still agree otherwise, as provided in article 3.

61. Mr. SCHNEIDER (Germany) said that, in practice, payment orders were commonly given by tape, in writing or by telephone. In the case of written payment orders, the only proof of authenticity was the signature, so it was a commercially reasonable method of authentication under the circumstances. In the case of telephone orders, reliance was placed on a key word and voice recognition. That was commercially reasonable practice, for example, in serving customers in the travel business. He could not agree with the observer for Sweden that, contrary to normal practice in many countries, banks should not be able to rely on a signature.

62. He did, however, support the general rule that the method of authentication should be commercially reasonable and secure. Nevertheless, he also thought that the parties should be free to agree on the use of a method which was not commercially reasonable. He therefore proposed that article 4(3) should be amended to read: "The parties are permitted to agree, by written agreement only, that paragraph 2 shall apply if the authentication is not commercially reasonable."

63. The CHAIRMAN said that the situation in the case of a telephone order was a question of interpretation. He could not agree with the representative of Germany on that point.

64. Mr. VASSEUR (Banking Federation of the European Community) said that the problem of payments being made on the basis of forged signatures certainly existed. Approximately 25 per cent of payment orders in France were paper based. French jurisprudence distinguished between two cases. In the first

(Mr. Vasseur, Banking Federation of the European Community)

case, where there was a clear discrepancy between the signature on the order and the specimen signature - an obvious forgery - a receiving bank which failed to detect the forgery and executed the order would be responsible. In the second case, that of a perfect forgery undetected by the receiving bank, the law had ruled that the receiving bank should bear the loss because the purported sender had not sent the order.

65. He suggested that the question of forgery should be covered in the draft Model Law, a distinction being made between the two cases he had described, together with a clear statement as to who would be liable in each case.

66. The CHAIRMAN said that the question might give rise to a basic conflict between the civil law and common law approaches, which could not easily be solved. It would be better, therefore, to leave the question of risk allocation to traditional law.

67. Mr. DE BOER (Netherlands) said that the first case came under the rule that the bank must comply with a method of authentication. If the second case was a matter for national case law, forgery could be excluded from article 4(2) to (4). He would therefore support the Swedish suggestion.

68. Mr. HERZBERG (Observer for Israel) said he agreed that it would be better to leave the legal situation as it stood.

69. Mr. LOJENDIO OSBORNE (Spain) said that article 4(4) could not be kept as it was if the problem of forgery were included, because it concerned the payment order, whereas a forgery presupposed a handwritten signature. However, perhaps the most important element was the burden of proof, and he therefore supported the Swedish suggestion. According to article 4(4) the sender had to prove that the order resulted from the action of another person, and the conditions seemed to him excessive.

70. The question of forgery should be treated separately, to avoid conflict with article 4(4); and the more substantive issue of burden of proof could be discussed at a later stage.

71. Mr. CONOBOY (United Kingdom) said that his delegation's views had been stated earlier in the discussions. He noted that, while a signature would not be regarded as a commercially reasonable method of authentication in Sweden, the observer for Sweden accepted that it might be so regarded in other countries. That was the way in which the Working Group had intended that the Law should operate and he was satisfied to leave article 4 as it stood.

72. Ms. KRAG JORGENSEN (Denmark) said that, as she understood it, article 4(1) dealt with the matter of a person becoming a sender and being bound by a payment order issued by another person with authority, but it did not prescribe when and how a person became part of a transaction. That had apparently to be left to the national law and the national law would therefore regulate forgery.

(Ms. Krag Jorgensen, Denmark)

73. According to article 4(2), however, there must be an agreement between the parties, under national law, to accept an authentication procedure. Thus, the sender and his bank would be able, under the rules of national law, to accept a certain procedure which allowed for the problem of forgery.

74. Mr. BERGSTEN (Secretary of the Commission), referring to the discussions on article 4 in the Working Group, said that paragraph 1 was the basic rule in that it stated that the sender was bound by a payment order sent by himself or by another person who had the authority to bind him. The Working Group had felt that the question of what person had the authority to bind the sender was essentially a question of agency, the legalities of which were too complicated for the Model Law to handle. The Working Group had simply accepted the consequences if the other person actually had the authority. There was no mention of authentication, merely of the factual situation.

75. According to paragraph 1, if the person sending an order was not the purported sender but someone who purported to be an agent but did not have the authority, the bank would incur the risk. Most of the discussion had turned on the circumstances in which the risk of the false or unauthorized message should be shifted from the bank to the purported sender.

76. The Working Group had been concerned almost entirely with electronic and computer communication, and there had been no discussion of oral or written communications. The representative of Mexico had correctly stated that the Working Group had not decided that a written payment order and a signature did not come within the scope of paragraphs 2 to 4: there had been no positive decision; the subject had not been discussed. In his opinion, there was no need for any change in the text.

77. Paragraph 1 and paragraphs 2 to 4 were concerned with the allocation of risk. It was essential to decide who would bear the risk in the case of non-authenticated payment orders acted on by a bank. If the Commission did not wish the rule, devised in the context of the computer, to cover the traditional situation of the written payment order also, it would be best to say that paragraphs 2 to 4 did not apply to the latter case, which would then be covered by paragraph 1 only.

78. Mr. ABASCAL ZAMORA (Mexico) said that, under article 4 as currently drafted, a bank executing an order with a forged signature would be liable whether the forgery was a good one or not. Article 4 provided that the parties could agree on a means of authentication and there was no need to prevent them from agreeing on a method which included comparison of signatures, together with passage of the risk, as appropriate. He could see no reason to change the text.

79. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that, at an earlier meeting, his delegation had stressed the need to use a commercially reasonable method for comparing signatures. On the question of allocating risk, if the risk were borne by the receiving bank, the cost of credit

(Mr. Tchernychev, Union of Soviet Socialist Republics)

transfers would greatly increase. If the person receiving the payment order bore the risk, that party would have to insure against it and would urge his the bank to use a commercially reasonable method other than signature comparison, which would make the bank's service to its client far more expensive, and would also extend the duration of the operation. The result would be an increase in the cost of the operation to the sender, which was not desirable.

80. The CHAIRMAN said that no one was suggesting that there should never be any comparison of signatures. The question was whether paragraphs 2, 3 and 4 of article 4 should apply to handwritten signatures or not.

81. Following a show of hands which indicated a majority in favour of excluding handwritten signatures from the scope of paragraphs 2, 3 and 4, he said that there was no need to complicate matters by adding a further paragraph. It would suffice if the article were modified along the lines suggested by the Secretary.

82. He also asked the Drafting Group to insert the words "as a sender" into the second line of the opening sentence of paragraph 2 before the word "if", provided it did not consider the insertion to be a matter of substance.

83. He said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 2 as amended.

84. It was so decided.

The meeting rose at 12.40 p.m.